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No. 770

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

CHICAGO, ROCK ISLAND & PACIFIC R. CO., et al.,
Appellants

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, *Appellees*

On Appeal from the United States District Court for the Eastern District of Missouri, Eastern Division

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MOTION TO AFFIRM FILED ON BEHALF OF WATERWAYS BULK TRANSPORTATION COUNCIL, INC.

ALEXANDER B. HAWES
815 Connecticut Avenue, N.W.
Washington, D. C. 20006
Counsel for Waterways Bulk Transportation Council, Inc.

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Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, Waterways Bulk Transportation Council, Inc., ("the Council") an intervening party before the Interstate Commerce Commission and the district court, moves that the judgment of the district court be affirmed.

STATEMENT

In 1955, a complaint was filed before the Interstate Commerce Commission charging appellants with maintaining discriminatory charges for reshipments of grain and grain products arriving at certain Mississippi River ports by barge transportation. The complaint initiating the proceedings before the Commission charged violations of Section 2 as well as Sections 3(1) and 3(4) of the Interstate Commerce Act ("the Act"), 49 U.S.C. §§ 2, 3(1) and 3(4). The Commission refused to accept evidence of the divisions of through all-rail rates which the barge lines sought to introduce as a measure of the alleged discrimination. On review, this order was vacated and the case remanded to the Commission. *Arrow Transp. Co.* v. *United States*, 176 F. Supp. 411 (1959), *aff'd per curiam, State Corp. Comm.* v. *Arrow Transp. Co.*, 361 U.S. 353 (1960).

Pursuant to the remand the Commission reopened its docket No. 30744 and received evidence of the divisions received by the appellants for reshipments of ex-rail grain. The Commission permitted the intervention and participation of the Waterways Bulk Transportation Council, Inc., an association of shippers and water carriers using and performing bulk barge transportation exempt from regulation under Section 303(b) of the Act, 49 U.S.C. § 903(b). The Commission, by its Corrected Order of January 30, 1963, (Appendix E to Jurisdictional Statement, pp. 34-35) found that:

> "rates for the rail movement . . . are and for the future will be discriminatory against connecting common carriers by water subject to Part III, *and unjustly discriminatory against shippers whose grain and grain products reach those ports by for-hire barge transportation,* to the extent

> that those rates exceed the . . . rates or . . . divisions [on like ex-rail transportation]". (Emphasis supplied.)

The Commission's Order was sustained by the court below, 233 F. Supp. 381, and the appellants have prosecuted this direct appeal to this Court.

ARGUMENT

Preliminarily, the Council points out that its interest is limited to that part of the order of the Interstate Commerce Commission, sustained by the decision of the court below, that requires the appellants to cease and desist from rate discrimination against grain arriving at the railroad shipping points on the Mississippi River by for-hire barge transportation, whether such barge transportation is regulated or exempt from regulation under Part III of the Act.

The decision of the district court is plainly correct. As pointed out in the opinion of the district court, this Court has specifically held that the prohibitions in Section 2 of the Act against carrier discrimination include discrimination, by means of rates or otherwise, directed at shippers moving their products by unregulated barge lines. (Jurisdictional Statement, p. 24.)

The "all-fours" case is *James McWilliams Blue Line, Inc.* v. *United States,* 100 F. Supp. 66 (S.D.N.Y. 1951), *aff'd per curiam,* 342 U.S. 951 (1952). There, a barge line carrying coal under the exemption for bulk barge transportation complained against railroad rate discrimination, alleging violations of Section 2, 3(1) and 3(4) of the Act. A closely divided Commission refused to entertain this complaint on the

ground that no protection was afforded by the cited Sections for unregulated barge traffic. *James McWilliams Blue Line, Inc.* v. *Campbell's Creek R.R.*, 278 I.C.C. 312 (1950). Review by the district court resulted in reversal of the order and in specific rejection of the contention, urged here, that the Commission cannot enjoin railroad rate discriminations against barge transportation conducted under the bulk exemption. The Commission and the railroads appealed the decision to this Court and argued vigorously that traffic moving by barge transportation exempted under Section 303(b) was not entitled to the protection of Section 2 of the Act.[1] However, *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567 (1947), had established that Section 2 of the Act protects all shippers using for-hire barge transportation, whether regulated or unregulated,[2] and it took this Court only one sentence and one citation to reject the argument:

> Per Curiam: The motion to affirm is granted and the judgment is affirmed. *Interstate Commerce Com.* v. *Mechling*, 330 U.S. 567.

The eloquent brevity of the *Blue Line* decision underscores the pointlessness of the instant appeal. Eighteen years after the *Mechling* decision, and thirteen years after the *Blue Line* per curiam, the rail-

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[1] The analogy drawn by appellants and rejected by this Court was that unregulated barge traffic moving on the coastal waterways was entitled to the same protection as barge operations on the Yangtze River. Appellants' Jurisdictional Statement, p. 11, *Interstate Commerce Commission* v. *James McWilliams Blue Line, Inc.*

[2] In *Mechling*, this Court approved a Commission order enjoining railroad rate discriminations. The discriminations were directed against shippers using regulated and exempt barge transportation.

roads should reconcile themselves to the fact that exempt water transportation of bulk commodities is a recognized part of the national transportation system, and the shippers who choose to take advantage of its inherent cost advantages are not to have their shipping economies eroded by discriminatory charges made by the railroads.

With reference to the questions presented, as stated by the appellants in their Jurisdictional Statement, p. 3, Question 1 in effect accuses the Commission of misconstruing Section 3(4) of the Act in prescribing rates for rail transportation of grain brought to Mississippi River ports by water in unregulated barge movements. The question as stated misconstrues the Commission's order. The part of the order that involves Section 3(4) was specifically amended by the Commission's Corrected Order of January 30, 1963, (Appendix E to Jurisdictional Statement, pp. 34-35) so as to apply only to discrimination "against connecting common carriers by water subject to Part III," and thus does not apply to unregulated water carriers or to the grain carried by them. The only parts of the order that seek to end discrimination involving grain transported by all for-hire barge transportation, thus including barge transportation performed under the Section 303(b) exemption, ban discriminations against *shippers* using such transportation, and are therefore clearly based not on Section 3(4) but on Section 2 of the Act.

Appellant's Question 2 in effect asks the Court to hold that Section 2 of the Act is inapplicable because no shipper by exempt barge transportation testified to a competitive disadvantage occasioned by the discriminatory divisions. But discrimination prima facie

exists to the extent that the railroad rate division applicable to an ex-rail movement is lower than the railroad rate charged on a like ex-barge movement. *Arrow Transp. Co.* v. *United States,* 176 F. Supp. 411 (N.D. Ala. 1959), *aff'd per curiam, State Corp. Comm.* v. *Arrow Transp. Co.*, 361 U.S. 353 (1960); *accord, Interstate Commerce Commission* v. *Mechling,* 330 U.S. 567 (1947). These cases establish that an outbound carrier cannot legally exact compensation on ex-barge shipments that exceeds the compensation accepted on like movements of ex-rail shipments. Appellants' tariffs discriminated against all ex-barge grain and made no distinction between grain arriving by regulated and grain arriving by unregulated water transportation. The remedy fashioned by the Commission to protect shippers using for-hire barges was properly as broad as the discrimination found. *Federal Trade Commission* v. *Ruberoid Co.,* 343 U.S. 470, 473-75 (1952); DAVIS, ADMINISTRATIVE LAW TREATISE, Sec. 8.19 (1958). In the *Ruberoid* case, this Court said (at p. 473):

> "Orders of the . . . Commission are . . . intended . . . to prevent illegal practices in the future. In carrying out this function, the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal . . . . [W]e have said that 'the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.' [*Jacob Siegel Co.* v. *Federal Trade Commission*], 327 U.S. at 613."

Appellant's Question 3 asks the Court to find an unconstitutional deprivation of due process in the Commission's order. Without benefit of citation of precedent or reasons of policy, this Court is told that the Commission's interpretation of the Act unfairly handicaps regulated carriers in their competition with unregulated carriers, and is therefore a violation of due process. (Jurisdictional Statement, p. 8.) The contention ignores respected authority to the contrary. The fact that a "member of the class which is regulated may suffer economic losses not shared by others . . . has never been a barrier" to regulation. *Bowles* v. *Willingham*, 321 U.S. 503, 518 (1944). There is no violation of due process when, in the words of the court below:

> the railroads . . . are free to set the division or rates charged on ex-barge and ex-rail reshipments at a compensatory level. (Jurisdictional Statement, p. 25.)

The exemption for bulk water carriage, premised on a clear Congressional finding that there is no effective cost competition between the railroads and the barges carrying bulk commodities, has been applied for 24 years. It is too late to contend that Congress had no reasonable basis for granting an exemption from regulation, subject to certain expressed limitations, to barges carrying bulk commodities. The alleged constitutional infirmities in the Commission's order were not apparent to this Court on the prior occasions when it applied Section 2 to rate discriminations against shippers using exempt as well as regulated for-hire barge transportation. *Interstate Commerce Commission* v. *Mechling, supra; James McWilliams Blue Line* v. *United States, supra.* Serious and substantial con-

stitutional questions are not presented merely because an appellant says they are.

CONCLUSION

Appellants present no substantial question for the decision of this Court. The judgment and decree of the district court should be affirmed.

Respectfully submitted,

ALEXANDER B. HAWES
815 Connecticut Avenue, N.W.
Washington, D. C. 20006
Counsel for Waterways Bulk Transportation Council, Inc.

January 15, 1965

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing Motion to Affirm was mailed, postage prepaid, to each of the parties of record herein.

Dated, January 15, 1965.

s/ ALEXANDER B. HAWES
Alexander B. Hawes